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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-605

DONALD L. BUCKELEW,
PETITIONER

versus

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama was rendered May 30, 1972, and has not yet been reported. It may be found in the Appendix to the Petition for Writ of Certiorari filed by Buckelew. The Supreme Court of Alabama denied certiorari, without opinion, on July 20, 1972.

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama which was rendered on May 30,

1972. A petition to the Supreme Court of Alabama for a writ of certiorari was denied on July 20, 1972.

Petitioner applied for this writ of certiorari under the provisions of 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

(1) WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL MERELY BECAUSE THE JURY BOX FROM WHICH THE GRAND JURY AND THE PETIT JURY WERE DRAWN CONTAINED ONLY 1500 NAMES.

(2) WHETHER PETITIONER WAS UNDULY LIMITED IN EXAMINING THE CLERK OF THE JURY COMMISSION AND ONE OF ITS MEMBERS SO AS TO DENY HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Respondent finds the Statement of the Case appearing in the Petition to be adequate with the exception of the first paragraph and references to the number of persons alleged to be qualified to serve as jurors in Madison County, Alabama.

ARGUMENT

Petitioner seeks the ultimate reversal of his conviction for possession and sale of lysergic acid diethylamide (LSD) on the ground that the jury box from which the grand and

petit juries were drawn contained only fifteen hundred (1500) names. Petitioner further claims that the trial court unduly limited examination of the Clerk of the Jury Commission and one of its members frustrating his effort to determine whether those jurors represented a cross section of eligible citizens.

However, as shown below, Petitioner's contentions were correctly disposed of in the Alabama Court of Criminal Appeals and do not warrant consideration by this Honorable Court.

I

THERE IS NO PRESUMPTION THAT A JURY ROLL CONTAINING ONLY 1500 NAMES DOES NOT REPRESENT A FAIR CROSS-REPRESENTATION OF ALL THE CITIZENS OF MADISON COUNTY QUALIFIED TO SERVE AS JURORS.

Petitioner claims that the Court of Criminal Appeals incorrectly held that where there is no systematic exclusion of any class or classes by reason of unconstitutional discrimination a prisoner is not entitled to have his conviction reversed merely because a high per centage of the names of those eligible were not on the jury roll. It is noted that there is no claim that the Jury Commission did not act diligently and in good faith. Furthermore, there is not even a hint that purposeful discrimination or fraud occurred or resulted in filling the jury box.

Title 30, Section 46, Code of Alabama 1940, Recompiled 1958, provides that no objection can be taken to any venire of jurors except for fraud in drawing or summoning the jurors. Alabama Courts have frequently held that irregu-

laraties in filling the jury box do not render the venire void. The appropriate remedy is to institute mandamus proceedings to require the Jury Commission to fill the box as required by statute. *Garner v. State*, 206 Ala. 56, 89 So. 69 (1921); *Wimbush v. State*, 237 Ala. 153, 186 So. 145 (1939); *Welch v. State*, 28 Ala. App. 273, 183 So. 879. In *Garner*, supra, the conviction was affirmed where the jury box contained only 600 names even though it had contained 1,400 names previously.

While the primary issue for review in this case is of first impression it is submitted that Petitioner has presented no authorities to support claims that his constitutional rights have been infringed. The cases sought to be relied on all involved racial discrimination which does not infect the trial sub judice.

The often cited case of *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303, is similar in many respects to the case at bar although racial discrimination was alleged therein. In *Fikes*, supra, the jury venire had been quashed and a new roll prepared shortly before the grand and petit juries were drawn. The Jury Commission had only been working about 12 days preparing the new roll which contained 1500 names. In approving the trial court's denial of Defendant's motion to quash the indictment and venire the Alabama Supreme Court said:

> "There is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, in the absence of fraud (or a denial of constitutional rights)."

See also *Ex parte Seals*, 271 Ala. 622, 126 So. 2d 474; and *Bridges v. State*, 284 Ala. 412, 225 So. 2d 821.

The language quoted from *Fikes* was approved by this Honorable Court in *Swain v. State of Alabama*, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759(1965). In affirming the conviction of Swain, Mr. Justice White noted that although the jury commission is required by statute to place the name of every qualified citizen on the jury roll this isn't done in practice. He found that a typical jury roll contains only about 2,500 names at best out of approximately 16,406 eligible persons. It was there held that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn." Furthermore, "*neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.*" Emphasis added.)

Petitioner relies on statements taken from *White v. Crook*, 251 Fed. Supp. 401 (D. C. Ala. 1966) and *Mitchell v. Johnson*, 250 Fed. Supp. 117 (D. C. Ala. 1966) to the effect that a jury commission should comply with the statutory requirements to a substantial degree. However, both cases involved systematic exclusion of negroes from jury service which is certainly not present here.

> In his opinion in *Mitchell*, supra, Judge Johnson wrote: "This Court recognizes the practical difficulties which will be faced by the jury commission in putting into the jury box the name of every qualified juror on the comprehensive list to be prepared by the jury clerk. This Court further recognizes that the law of Alabama as stated in Fikes v. States, supra, does not require,

> literally, that *every* qualified person's name be placed on the rolls or in the box. However, the law does require that the jury commissioners do not place so few names in the jury box as not to obtain a full cross-section of the county. In this connection, there should be no less than 1000 names placed in the jury box at each refilling."

The *Mitchell* case arose out of Macon County, Alabama. In *White v. Crook*, supra, the District Court also said that no less than 1000 names should be placed in the jury box in Lowndes County, Alabama, at each refilling.

As noted in the opinion below the requirement that the jury commission place on the roll every eligible person was recognized as being permissive rather than mandatory by this Honorable Court in *Carter v. Greene County*, 396 U. S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970).

Petitioner has made no claim that the grand jury which returned the indictment or the petit jury which rendered the guilty verdict were racially biased, "prosecution oriented" or a "blue ribbon" group. Nor were any such claims made with respect to the jury roll. No fraud, systematic exclusion or discrimination directed to any identifiable group or class was alleged. Absent some allegation and *proof* that the jury box contained so few names that a significant identifiable class or group was excluded which operated to prejudice the defendant and deny a fair and impartial trail there can be no determination that Petitioner was denied any constitutional rights. Therefore, it is submitted that the decision below is correct and no important question of federal law is presented for review.

II

EXAMINATION OF CLERK OF THE JURY COMMISSION AND ONE OF ITS MEMBERS WAS NOT UNDULY LIMITED BY TRIAL JUDGE.

It is argued that the trial judge limited examination of the clerk of the jury commission and one of its members during the hearing on the motions to quash filed by Petitioner preventing evidence to show that the jury roll contained constitutional dificiencies. The Alabama Court of Criminal Appeals disposed of this allegation by alluding to the fact that since there were no allegations of fraud, systematic exclusion, or qualitative deficiencies, Petitioner had not chosen the appropriate remedy. As pointed out above the means in Alabama for requiring the Jury Commission to place more names in the box is by mandamus.

Aside from the propriety of the remedy there can be no doubt that after carefully considering the testimony elicited at the hearing on Petitioner's motions to quash that he was allowed to glean all of the facts pertinent to the Jury Commission's activities in filling the jury box from which the grand and petit juries in the instant case were drawn. It affirmatively appears at pages A-46 through A-60 of Petitioner's brief that Mr. Maples, a Jury Commissioner, testified as to the procedure used to fill the box. Mr. Maples even produced the jury roll for inspection by counsel of Petitioner and the Court. The trial court overruled the motions filed by Petitioner but subsequently allowed him to examine the Clerk of the Jury Commission who was not available at the time Mr. Maples was questioned. This demonstrates the trial court's willingness to cooperate with counsel. No evidence was adduced to indicate that the trial court had not ruled correctly. It is noteworthy that even

though counsel for Petitioner was allowed to inspect the jury roll no allegations with respect to composition are argued herein.

Thus, Petitioner's claim that questioning of the Jury Commissioner and Clerk was severely limited does not have any basis in fact.

III

MERE STATEMENTS OF COUNCIL DO NOT PRESENT GROUNDS FOR REVIEW.

> At page 18 of Petitioner's brief the following appears: "The Petitioner strongly insists that his constitutional rights under the equal protection clause guaranteed under the Fourteenth Amendment of the Constitution of the United States have certainly been abridged. All indictments against all other defendants, except your Petitioner have been quashed. The entire jury venire that convicted your Petitioner has been quashed. The numerous defendants indicted by the same Grand Jury as your Petitioner have had their indictments quashed."

It does appear that subsequent to the trial court's ruling on Petitioner's motion Circuit Judge Thomas N. Younger quashed the jury venire summoned for service during the week of November 16, 1970. Defendants were also discharged from prosecution under indictments in five cases after Judge Younger concluded that the jury box had not been lawfully filled. Petitioner filed an amended motion for a new trial and motion for reconsideration based on Judge Younger's order which was denied.

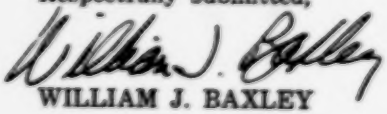
While the record affirmatively shows that no evidence was presented to Judge Archer in this case to dictate quashing either the indictment or the venire, absolutely no indica-

tion exists as to what facts were presented upon which Judge Younger subsequently acted. From aught that appears Judge Archer was correct and Judge Younger was incorrect. Furthermore, the statements that "all indictments against all other defendants, except your Petitioner have been quashed" and "The entire jury venire that convicted your Petitioner has been quashed", are mere statements of counsel not supported by the record. Neither party can rely on evidence outside the record or appeal. *Duran v. U.S.* 413 F. 2d 596 (9th Cir. 1969), cert. den. 400 U.S. 997; *Ware v. U.S.* 356 F. 2d 787 (D.C. Cir. 1965). There is no indication in the record that all other indictments returned by Grand Juries drawn from the jury box as constituted at the time of Petitioner's conviction have been quashed. Moreover, statements as to the number of citizens qualified for jury service in Madison County, Alabama are not supported by the record.

CONCLUSION

Petitioner argues that there is a constitutional right to more than 1500 names on the jury roll in Madison County, Alabama. He makes no allegations of systematic exclusion, racial discrimination, or fraud in making out the jury rolls. Neither is there a claim that any identifiable class or group was not represented even though the record shows that counsel for Petitioner was allowed to inspect the rolls. Obviously, there is no precedent for such a position and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of November, 1972, I served the requisite number of copies of the foregoing Brief for Respondent In Opposition upon Honorable Robert Charles Barnett, 912 City Federal Building, Birmingham, Alabama 35203, Attorney for Petitioner, by depositing the same in the United States mail, first class postage prepaid, properly addressed to him at the address given.

Walter S. Turner

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